

JPRS: 3400

16 June 1960

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THE NEW DRAFTS OF THE (WEST GERMAN) FEDERAL JUSTICE
MINISTRY OF COPYRIGHT REFORM

by W. Kost

19990430 127

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FOREWORD

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JPRS: 3400

CSO: 3882-D

THE NEW DRAFTS OF THE (WEST GERMAN) FEDERAL JUSTICE

MINISTRY ON COPYRIGHT REFORM

[The following is a translation of an article by W. Kost, Hanover, in Kartographische Nachrichten (Cartographic News), No. 1, Munich 1960, pages 11-18.]

A. Reasons for Revision of Drafts Prepared by Ministry's Legal Division

In the spring of 1954, the Federal Justice Ministry published the drafts of a copyright law, a law on copyright exploitation companies, and a law on the participation of the German Federal Republic in the Bern Convention which was revised in 1948 in Brussels. These drafts were published under the heading "Legal Division Drafts on Copyright Reform" with the intention of launching a thorough public discussion of the subject prior to the preparation of the final government bills. The result was a very long and critical discussion which found expression in numerous publications in the technical and daily press, as well as in letters to the Federal Justice Ministry. These communications contained many conflicting opinions. In an effort to coordinate these differing views, the Federal Justice Ministry refrained from launching parliamentary work on the reform by presenting these bills at this time; rather, the ministry revised the first drafts in some respects; it gave special consideration to certain rights which had been demanded by authors and which it had either rejected or considered premature in the past. Here are the points involved.

(a) Author's followup remuneration, i.e., introduction of obligatory remuneration for the use of works that have become public property.

(b) Followup royalty right, i.e., the sharing of creative artists in the increased value of those of their works which they have sold.

(c) Lending fee, i.e., extension of copyright protection to the lawfully free renting of books, magazines, etc., by lending libraries and readers clubs.

At the end of August 1959, new drafts for a copyright law and a law for copyright exploitation companies were submitted to the public with the request that views and opinions be communicated to the Federal Justice Ministry by 31 March 1960.

B. Critical Examination of Provisions Important to Cartography

I. The Ministerial Draft of a Law on Copyright Law and Related Protective Laws

In addition to copyright, the title of the law also mentions the related protective laws in an effort to make it clear that a quite considerable part of the law will deal with these new rights. The third part of the law is devoted to special provisions for films; the fourth part contains common provisions for copyright law and related protective laws; the fifth and last part contains the sphere of application of the law, including temporary and final provisions.

(a) The Copyright Law. Paragraph 1 defines the objective of copyright protection. This means, quite generally, works of literature, science, and art; the term "works" here means only personal intellectual creations. Here are some examples that were listed and that are of interest primarily to the cartographer: "Illustrations of a scientific or technical nature, such as drawings, plans, maps, sketches, and three-dimensional representations." In contrast to the currently applicable law, there is no definitive listing of protected types of works; the draft lists only examples, so that future newly-developed types of work may readily be covered by this protection. From the cartographer's viewpoint, it is to be welcomed that maps and three-dimensional representations are included among the examples listed. The term "work" is not defined in the current law. According to the explanatory remarks to the bill, "personal intellectual creations" are taken to mean creations representing something new and peculiar by virtue of their content or form. In contrast, we have the communication of the Copyright Committee of the German Cartographic Society to the Federal Justice Ministry (1), in which it is stated that a map is an intellectual creation and is entitled to protection only if it is the result of individual, novel effort as to content and form; this letter also contains the demand that the motivating sections in the law make it clear that maps are objects of copyright protection, not only because of the factual material published in them -- i.e., because of their content and form -- but also because they constitute an intellectually and graphically independent product.

Article 2 says the following about editorial work and revisions. "Translations and other revisions of a work, which are the personal intellectual creations of the person working on them, are protected like independent works, regardless of the copyright on the original work being translated or revised." This provision is in line with Article 2, Paragraph 2, of the Brussels version of the Bern Convention and has been taken over unchanged from the legal division's draft; it corresponds to German law. The new developments in the case of "collected works" (Article 3) are quite informative. The law (Article 4, LUG, and Article 6, KUG) deals with the "works consisting of the separate contributions of several persons (collected works)" and awards copyrights for the "work as a whole" to the author or, if the

latter is not named, to the publisher. It thus does not contain any general provisions on collected works. In agreement with Article 2, Paragraph 3, of the Brussels version of the Bern Convention, the legal division's draft extends this regulation to all collections of works, assuming that the selection or arrangement of the works constitutes a personal intellectual creative effort.

The new text of the law goes even further and includes also collections of contributions under copyright law. Here is what this new text says. "Collections of works or other contributions, which constitute personal intellectual creation by virtue of selection or arrangement (collected works), are protected like independent works, regardless of copyright protection covering the original works so selected or arranged."

The publication and actual placement on sale of a work are acts that have legal significance; this applies, e.g., when maps are incorporated into a collection for parochial, public, or other education. For this reason, the legal divisions draft specified a definition of concepts for publication and placement on sale in contrast to existing law. Accordingly, a map is considered published as soon as it has been made available to the public with the approval of the person authorized to do so. According to the new provisions, it is considered to "have been placed on sale" if, with the approval of the person holding the rights to it, sufficient copies have been made and offered to the public for sale or have been placed in circulation via sales outlets.

Who is the holder of the copyright according to the new draft?

In line with the interpretation of Article 6, the man who created the map is its author. If he happens to be a selfemployed, free-lance cartographer, the situation is quite clear. But in cartography, it so happens that maps are prepared by official agencies or geographic and cartographic institutes, i.e., by corporations. The new draft, in agreement with the legal division's draft, does not grant copyrights to corporations, for only a physical person can create a personal intellectual work. The maps published by corporations do not contain any information on the person(s) who participated in cartographic work; the employment contract with these individuals tacitly includes the custom that the right of utilization belongs to the publisher. In view of these facts, Article 9, Paragraph 2, applies to corporations, which, as publishers of the maps, are empowered to claim the rights due an author. If the map does not list an author, it is assumed that the publisher holds these rights.

Article 8 is also important for cartography; it deals with the rights of authors of combined works. This may be the case, for instance, with an atlas in which the map appendixes of a cartographic text are combined with an explanatory text that was written by one or more scientific cartographers. In general, the relationship between the authors of the textual material and the cartographic

institute is regulated on the basis of contracts. In these and similar cases, this status should be aimed at as a matter of principle. But if this has not been done and if an author objects to joint exploitation, Article 8 provides that each author may ask the other author for approval of publication, exploitation, and changes, if such approval can be expected of the other author in good faith.

What is the meaning of copyright law?

Since it is the purpose of copyright law to assure the author of the economic exploitation of his work and to protect his personal interests in the work, the draft prefaces the provisions as to the content of copyright law with the following general statement. "Copyright law protects the author in the exploitation of his work and in his intellectual and personal relationships to the work." Moral rights and exploitation rights thus combine to form copyright law.

The legislators felt that the latter is the more important part of copyright law as far as the author is concerned. It is therefore treated first. Only the right of publication, which belongs to both spheres of copyright law, is put ahead of this; this is so, because exploitation rights -- with the exception of reproduction rights in case of unpublished works -- can be claimed only simultaneously with publication rights.

The publication right (Article 11) grants the author the right to specify whether and how his work is to be published. Furthermore, the public announcement of the content of his work or its description are reserved to him so long as neither the work, nor its essential content, nor a description of the work have been published. The insertion of the word "public" -- in contrast to the legal division's draft -- is intended to emphasize that the nonpublic announcement of the content of a work is covered by the author's publication right just as little as it is in existing law. Cartography should use this publication right more than ever. Especially in the case of newly-published maps, this right can help the creative cartographer prepare an open and objective selfcriticism which will be of advantage to him in the coming discussion of his work. The past teaches us that this right must not be neglected.

The applicable copyright laws as a matter of principle guaranteed the author all exploitation possibilities, except certain limitations inherent in the nature of copyright law itself; these current laws in conclusion listed the individual perquisites of the author. The development of technology has shown us that it is not practical to have the law enumerate all types of exploitation because it is very easily possible that new ones might be discovered in the course of time. The legal division's draft therefore provided that the author should have the exclusive right to exploit his work; and this would include any future exploitation forms. The discussion on the legal division's draft has shown that, when a general exploitation

right is granted, the author may also claim rights which the legislator does not want to grant him. The new draft therefore partly discards the concept of superordinate general exploitation rights and distinguishes between the exploitation of the work in physical and nonphysical form. By physical form, this draft means the exploitation of the original or of the reproduced copies of the work; the exploitation types are listed in Article 12, Paragraph 1 (reproduction rights, dissemination rights, film rights, exhibition rights). For nonphysical reproduction, Article 12, Paragraph 2 lists as examples the right to broadcast and the right to present material in lectures, presentations, and performances. Here, the idea of granting a general right is maintained. The exploitation rights outlined in Article 12, Paragraph 2, refer only to public reproduction; nonpublic radio broadcasts, lectures, presentations, and performances continued to be free of copy-right claims.

The following forms of exploitation are of interest to the cartographer.

1. The right of reproduction (Article 13). The draft uses a concept that corresponds to the prevailing legal concepts and that was contained in the legal division's draft. Accordingly, the right of reproduction includes any reproduction of the work in physical form, regardless of the process used or the number of copies prepared. In the case of maps, this may be a photocopy or a print produced according to the screen printing or offset processes, etc.

2. The right of dissemination (Article 14). Here too the draft defines a concept which is identical to the interpretation used hitherto in law. In comparison to the legal division's draft, the new draft however relates the right of dissemination not only to the reproduction copies of the work but also to the original of the work itself. Dissemination takes place when the original or copies of the work are offered to the public or placed in circulation. In contrast to current law, the draft confines the right of dissemination not just to commercial dissemination. Further dissemination is permissible if copies have been placed in circulation with the approval of the copyright holder in the area where this law is applicable. The sale of official and private maps is handled primarily through the book trade. For the sale of official maps, the Reich minister of the interior set up uniform regulations for the entire Reich territory through the so-called Kart.-Lief.-Erlass [Map Delivery Decree], RdErl. d. RMdI., 31 May 1941, VIa 9224 II/40, 6860b. This uniformity unfortunately has so far not been restored fully; efforts to that end should be given as much support as possible.

3. Broadcasting right (Article 17). Radio so far has not been regulated in currently applicable copyright laws. But there is no doubt that, e.g., one manifestation of radio, namely television, will in the future constitute an excellent vehicle for the reproduction of newly published maps, atlases, etc. Hence, the right of broadcasting is of extraordinary importance to the cartographer.

Of all rights of exploitation, the author's right to edit and revise a work (Article 19), as well as the free use of a work (Article 20), are of special significance to the cartographer.

It was stated in Article 2 that the editing and revising of a work, when they constitute the personal intellectual creation of the editor or reviewer, are protected like independent works, regardless of any copyrights covering the work being so processed. This means that editing and revising in are free, but not their publication and exploitation, which require the approval of the original author (Article 19, Paragraph 1). The legal division's draft provided only for the approval of the original author; the word "approval" is intended to express the idea that subsequent authorization does not suffice.

The mapmaker must therefore realize that the legislator understands the revision of a map to be a result which, from the very beginning, preserves the essential features of the original map. The identity of the original map remains untouched, even if such revision involves a personal intellectual creation of the reviser. Consequently, he sees in the reproduction of the revision of a map at the same time the reproduction of the original map. The reshaping of a map (Article 19, Paragraph 2) is interpreted as the cartographer's effort to publish the result of his work as his own map and -- in contrast to map revision -- his effort not to bring out the features of the original map. In the explanatory notes to the draft, two cases are singled out in connection with "map reshaping" which the cartographer must watch out for.

In the first case, we have camouflaged plagiarism when someone uses another person's map as foundation for his own and adopts the essential features of the other man's map, but tries to hide this copying job and presents the other man's map as his own. In the second case, another man's map is used as foundation for the creation of an independently made map; but the cartographer does not completely succeed in creating a new independent map of his own because he cannot sufficiently discard the features of the map he uses as model.

In both cases, no independent new maps were made; rather, the essential features of the original maps remained preserved. They must therefore also be subject to the publication and exploitation right of the author of the original map. The new draft differs from the legal division's draft in that the provision on the reshaping is tied to that for editing and revising, because the reshaping of a work, in which it is taken over in its essential features, is closer to editing and revision than to free use. In case of reshaping, it no longer reads "in its essential features," but only "in essential features."

Even currently applicable law distinguishes between the editing or revising of a work and the free use of such a work for an independent new creation. The new draft adopts this idea in agreement with

the legal division's draft, and stresses that this free use must result in an independent work. The latter is covered by independent copyright; the approval of the author of the work used is not required for its publication and exploitation (Article 20).

In addition to exploitation rights, the draft grants the author further rights, all of which are of interest to the creative cartographer. These are the provisions on the protection of the intellectual and personal interests of the author in his work; they correspond to Article 6 of the Brussels version of the Bern Convention and are stated there as follows. "Independently of his property rights and even after such rights have been ceded, the author, throughout his lifetime, keeps the right to claim copyright protection for his work and to resist any disfiguring, mutilation, or other changes in his work or any other impairment of the work which might harm his honor or reputation." A separate section, entitled "Author's Personality Right," discusses the right to recognition of authorship and the right to forbid the disfiguring of the work.

The author's right to recognition of his authorship (Article 21) is warmly welcomed by the map creator. Too often, we see how -- on copies of a map revised by third parties for their own purposes -- the name of the original author or publisher was studiously covered up or entirely removed.

Protection of the author against the disfiguring of his work (Article 22) guarantees the author of a map the right to forbid the disfiguring or other impairment of his work which may jeopardize his reputation. This provision is of great importance especially in view of the representation of conditions and situations on political maps which is not always true fact and which as a rule is dictated by censorship authorities.

For legal practice with regard to copyright law, it is important that copyright law be transferrable neither in toto nor in part (e.g., exploitation rights). Now, in most cases the author cannot exploit his own work by himself; he is forced to grant utilization rights on his work to a third party. But the granting of the utilization right is to be interpreted merely as the granting of a license.

The utilization right can be granted as simple or exclusive right and is confined to the currently known modes of utilization; this is done in order to give the author a chance to decide all over again and by himself when new modes of utilization are discovered. It is also a limitation of the utilization right in spatial, temporal, and subjective fashion. The cartographer must keep in mind that the holder of a utilization right does not have the right, e.g., to change the title or authorship line in a map entirely on his own -- unless this right was expressly granted to him in the transfer contract. The author holds the exclusive right to make changes. Only those changes are permissible for which the copyright holder cannot deny his agreement in good faith (Article 34, Paragraph 2). In maps, this may be, e.g., one-color reproduction instead of multicolor reproduction or the reduction in the size of a map.

The author's exploitation right is subject to certain limitations in the interest of the general public. The draft here follows current law, but it draws the boundaries of copyright law partly wider, partly narrower than the existing copyright law provisions by giving consideration to changed conditions. Here it is above all modern technology which has created the need for new limitations as a result of the development of new reproduction processes.

Of the legal limitations on the right of exploitation, the cartographer is interested especially in the provisions on the preparation of individual reproduction items and in source lists.

For purposes of justice and public safety, anyone may make or cause to be made individual copies of a map for use in court proceedings, in arbitration, or for presentation to government agencies without having to obtain the approval of the author.

The right of reproduction for personal use has been developed in a special fashion (Article 50). The new draft contrasts the traditional concept of personal use, which it maintains, against the concept of "other personal use," which it does not define further; here the new draft probably means primarily commercial use, as well as use by government agencies, public libraries, etc. For personal use it is permissible, e.g., to make several reproduction copies of a map; on the other hand, the production of such copies for other uses depends on the payment of a suitable remuneration to the author. This remuneration obligation is not applicable when the copies are made for intraoffice use in government agencies or for use in public libraries or public scientific institutes, or when they are made upon request of these bodies for their own use.

Maps are reproduced mostly with modern photocopying equipment. Reproduction copies made in this manner may later on be neither disseminated nor used for public presentation (lectures, performances, broadcasts) (2, 3).

In line with current law, Article 60 stipulates when, in cases of free use of a work, there exists an obligation to cite sources under all circumstances and when this is required only in keeping with custom. In the case of maps and atlases, it is often very difficult to list all sources used. The listing of sources for maps and atlases has been discussed often. A useful solution for maps was suggested in the form of giving only main sources and of limiting the source listings to ten. In atlases, it is recommended to list the sources in a special section.

The provisions stipulated in the draft as to the duration of the copyright specify that the copyright is to expire 50 years after the author's death, in agreement with existing law and Article 7, Paragraph 1, of the Brussels version of the Bern Convention, as well as most foreign copyright laws. These provisions are not in line with the characteristics of a map, which is constantly subject to correction and supplementation because the situation in the terrain

continues to change. It must be pointed out that individual supplements, which do not essentially change the picture of the map, need not be included here. In case of corrections, the situation is quite different, though. It still seems necessary to insert a note in the explanatory remarks of the law to the effect that a protective period for maps commences with the expiration of the year of publication, correction, or revision noted on that map.

The provisions on the introduction of the remuneration obligation for the exploitation of works that have become public property constitute a new feature; this is the so-called copyright followup remuneration (cultural tax, domaine public payant). This remuneration is to be used for the support and advancement of the living authors as the intellectual heirs of the preceding generation of authors. The provisions in articles 69 to 74 must be considered as proposals for the introduction of the new right. It will depend on the future discussion whether they will be incorporated into the government bill for a copyright law.

(b) Related Protective Rights. "Related protective rights" are rights which do not protect creative efforts covered under copyright law, but which protect creative endeavors of a different kind that however are similar to the creative work of the author or that originate in connection with the work of the author. This includes the protection of the editions of foreign works and texts, e.g., certain scientific works and texts (old manuscripts, inscriptions, etc.) (Article 75), the protection of publications of bequeathed works (Article 76), the protection of photos (Articles 77-80), protection of practicing artists (Articles 81-99), protection for producer of sound carriers (Articles 90, 91), and protection of the broadcasting company (Article 92).

For the cartographer, it is of interest that the products of photography (photos) are not among the examples listed as protected works in copyright law. This is based on the fact that photos are artistic and technical works; in exceptional cases, a photo may also be a personal intellectual creation. Since it is difficult to distinguish between photo volumes and individual photos, the minister has decided to put photo volumes and individual photos juridically on an equal level and to set up photo protection uniformly as protection of work done; this is essentially equivalent to copyright.

(c) Common Provisions for Copyright and Related Protection. The civil and criminal law provisions laid down here in agreement with the legal division's draft deal with violations of copyright law and of the related protective laws, as well as with their punishment. As in patent law, the need has been demonstrated in copyright law for a consolidation of legal maxims. The drafts therefore seek to empower the provincial [land] governments to transfer, by means of judicial decree, copyright litigation cases under the jurisdiction of several judicial districts to the individual provincial and administrative courts, in so far as this would further justice.

Article 126 of the legal division's draft suggests that the provincial governments be empowered to set up boards of experts in the field of copyright law which would be charged with the duty of rendering expert opinions in problems of copyright law for the courts and attorney general's office; this suggestion was not adopted in the new drafts because the minister felt that the extensive judicial precedents in the field of copyright law obviate the need for consultation with specially set-up bodies of experts and because the consolidation of copyright litigation cases in a small number of provincial and administrative courts would anyway increase the expert knowledge of the judges. The abandonment of the organization of boards of experts may be explained in the light of general principle; the fact that there have been very few cartographic litigation cases and that appeals to the highest instances are therefore rare, enables us to deduce that there will be no need for experts in cartographic litigation cases either. Since it is to be assumed that litigation in cartographic cases will be on a minor scale also in the future, there is all the more reason to demand that in these cases only those experts be called in who have detailed knowledge of copyright law and especially of cartography.

(d) Application Sphere of the Law. Copyright protection is extended to all works whose authors are German citizens, regardless of whether and where the works have been published. If the work has been created by coauthors, it suffices for one of the coauthors to be a German citizen. Works by authors who are not German citizens but who are Germans in the sense of the Basic Law are protected like works of German citizens (Article 122).

Further provisions deal with the protection of the works of foreign nationals which were published within the sphere of application of this law (Article 123), with the protection of works of foreign nationals which published outside the sphere of application of this law (Article 124), and with the protection of the works of stateless individuals (Article 125). The protection of the works of foreign nationals and stateless persons arises first of all out of existing state treaties -- especially the Bern Convention in its Brussels version of 1948 and the World Copyright Agreement of 6 September 1952, which was ratified by the German Federal Republic on 24 February 1955.

With respect to related protective rights, one can apply the provisions for copyright-protected works in most cases; we shall not discuss the minor deviations here.

II. The Ministerial Draft of a Law on Exploitation Companies in the Field of Copyrights

Exploitation companies are enterprises which act as agents for a large number of copyright holders in handling copyrights or related protective rights for common further use. Their origin is closely

connected with the development of copyright law. This process began when the author, in addition to reproduction rights and dissemination rights, also had guaranteed to him further utilization forms of his work by the copyright laws and when it became impossible for him to take care of the exploitation himself. Since the exploiting agencies themselves were not in a position to find the individual authors and to conclude exploitation contracts with them, this situation considerably impaired the dissemination of works protected by copyrights. This brought about the formation of large organizations which contacted the individual authors or copyright holders, which handled the exploitation rights, and which collected remunerations previously agreed upon. France was the first country to found an exploitation company in the middle of the last century; this was the Societe des Auteurs, Compositeurs, et Editeurs de Musique. Today there are such exploitation companies in more than 30 countries.

The first such company was founded in Germany in 1903; it was the "Gesellschaft Deutscher Tonsetzer" (GDT) [Association of German Composers]. This organization dealt primarily with the exploitation of musical performance rights. At this time, we have a whole series of exploitation companies in Germany; one of the best known among them is GEMAG which handles only the rights of composers and lyricists.

The vast dissemination of works of literature and art in all countries of the world caused authors to seek to protect their rights also abroad. The exploitation companies in the various countries met this need by concluding reciprocal contracts and setting up an accounting system for the royalties collected. The exploitation companies are all under one international organization. This is the Confederation Internationale des Societes d'Auteurs et Compositeurs (CISAC) with headquarters in Paris. This organization however does not seek to exert influence on the internal business management of the individual national exploitation companies.

The exclusive right to the use of his work gives the author a legally guaranteed monopoly position with regard to his work. By joining an exploitation company and transferring their copyrights to it, the authors of a country hold an even stronger monopoly position. This monopoly has certain advantages for authors and exploitation companies; but it also has its disadvantages. This great power can easily be abused through refusal to acknowledge the rights of individual authors or holders of related protective rights or by the demand for too high royalties on the part of the exploitation companies. A further danger is constituted by the fact that these companies act as agents for the authors.

In agreement with the legal division's draft the new draft therefore maintains the idea of a legal limitation of the rights and duties of the exploitation companies above all in regard to the planned governmental supervision over these companies; but it makes considerable changes in the suggestions of the legal division's draft for the law on exploitation agencies.

One of the most important changes is the renunciation of the legal monopoly and the resulting control and limitation of the business activity of the exploitation agencies. This change furthermore constitutes a limitation against the law on the restriction of competition. We shall not go into detail here on the individual features of the provisions of the law on the exploitation agencies.

As far as the author knows, there are no exploitation companies in the field of cartography. Our geographic and cartographic institutes, which sell their map products not only at home but also abroad, will certainly move further along in this direction in order to exploit the developing business opportunities in this field.

C. CONCLUSIONS

The German Cartographic Society has come out in support of extensive map protection in the new copyright law through a letter to the Federal Justice Ministry.

(1) After publication of the new ministerial drafts, it will be necessary to ask the Federal Justice Ministry to meet the requirement of cartography in the explanatory remarks to the bill; this can be done by adding to the examples now listed under articles 19 and 20 those additional examples which point up the key problems of cartographic activity as affected by copyright law. This concerns first of all the preparation of a map and its free use for an independent new creation. As for the concept "start of protective period for maps", a short reference in the explanatory notes to the text of the law would not cause the legislator much extra trouble but would mean very much to the cartographer.

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